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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of	
Implementation of the Telecommunications Act of 1996:	**CC Docket No. 96-115**
Telecommunications Carriers' Use of Customer Proprietary Network and Other Customer Information	

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),[1] through undersigned counsel and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f), hereby submits its Comments in response to selected petitions seeking reconsideration and/or clarification of the *Second Report and Order*, FCC 98-27, released by the Commission in the captioned docket on February 26, 1996. Specifically, TRA herein supports two proposals it believes will strengthen the safeguards against carrier misuse and abuse of customer proprietary network information ("CPNI") embodied in Section 222(c) of the Communications Act of 1934 ("Communications Act"), as amended by Section 702 of the Telecommunications Act of 1996 ("Telecommunications Act"),

[1] A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services.

and opposes a proposal, voiced principally by incumbent local exchange carriers ("LECs"), which it believes would weaken these important safeguards.

A. The Commission Should Apply Section 272(c)(1) Nondiscrimination Safeguards to CPNI

TRA joins with those petitioners[2] that have urged the Commission to reconsider its holding that "section 272 imposes no additional CPNI requirements on BOCs' sharing of CPNI with their section 272 affiliates."[3] In so ruling, the Commission sought to resolve "an apparent conflict between sections 222 and 272" in a manner which "best furthers the policies of these two provisions, and, thereby, best reflects the statutory design."[4] While obviously well intentioned, TRA submits that the Commission's resolution of the perceived conflict does severe damage to the statutory scheme.

Section 272(c)(1) is straightforward in its mandate. In dealing with Section 272(a) affiliates, a Bell Operating Company ("BOC") "may not discriminate between that . . . affiliate and any other entity in the provision or procurement . . . of . . . information." As the Commission previously recognized, there is "no limitation in the statutory language on the type of information

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[2]0 *See, e.g.,* Petition for Reconsideration of the Competitive Telecommunications Association ("CompTel") at 2 - 10; Petition for Reconsideration and Clarification of MCI Telecommunications Corporation ("MCI") at 2 - 21.

[3] Second Report and Order, FCC 98-27 at ¶ 169.

[4] Id. at ¶¶ 158, 160.

that is subject to the section 272(c)(1) nondiscrimination requirement."[5] Thus, the Commission correctly concluded that "the term 'information' includes, but is not limited to, CPNI and network disclosure information."[6]

TRA submits that the "apparent conflict" perceived by the Commission between this clear Section 272(c)(1) mandate and Section 222(c)(1)'s directive that carriers shall only use, disclose or permit access to CPNI as necessary to provide the telecommunication service from which the information was received is illusory. Contrary to the Commission's belief that the statutory language contains "no express guidance . . . as to how Congress intended to reconcile these provisions,"[7] Section 222(c)(1) itself provides the answer. The mandate of Section 222(c)(1) is qualified by the phrase "unless otherwise provided by law." Thus, Section 272(c)(1) – which is no less the "law" than a provision of a separate act of Congress – trumps Section 222(c)(1).[8]

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[5] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶ 222 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *further recon. pending, remanded in part sub nom.* Bell Atlantic Tel. Cos. v. FCC, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* 12 FCC Rcd. 15756 (1997), *aff'd sub nom* Bell Atlantic Tel. Cos. v. FCC, 131 F.3d 1044 (D.C. Cir. 1997).

[6] Id.

[7] Second Report and Order, FCC 98-27 at ¶ 160.

[8] If Congress intended otherwise, it could easily have excluded CPNI from the Section 272(c)(1) nondiscrimination obligations by simple reference thereto or to Section 222. That it choose not to do so while at the same time qualifying the nondisclosure obligation of Section 222(c)(1) confirms that the Section 272(c)(1) nondiscrimination obligations apply to CPNI. Certainly, Congress proved quite capable of identifying other exceptions to Section 272(c)(1). *See* 47 U.S.C.§ 272(g)(3).

It is well settled that statutory construction is "a holistic endeavor" and that various provisions of a statute must be read in harmony with one another.[9] Here, the only reading that looks to the overall design, structure and purpose of the Telecommunications Act requires that the CPNI be treated as "information" subject to Section 272(c)(1)'s nondiscrimination requirements. Congress clearly intended that "section 222 . . . balance both competitive and consumer privacy interests with respect to CPNI."[10] Exempting CPNI from Section 272(c)(1)'s nondiscrimination obligations protects privacy interests without regard to competitive consequences. In contrast, treating CPNI as "information" for Section 272(c)(1) purposes strikes an appropriate balance between these two competing interests.

If Section 272(c)(1)'s nondiscrimination obligations apply to CPNI, BOCs must, if they are to share such information with their Section 272(a) affiliates, secure customer consent to disclose the information to competitive providers as well. Because a customer has the option to consent or to withhold his or her approval, the customer's privacy is protected. Competitive interests are also protected because BOCs will not be permitted to exploit their nearly ubiquitous access to customers and customer CPNI within their local service areas to secure a marketing advantage derivative entirely from their historical monopoly franchises. As the Commission has recognized, the Section 272 safeguards were intended "to protect competition in . . . ['the interLATA services and equipment manufacturing'] markets from the BOCs' ability to use their existing market power in

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[9] U.S. Nat. Bank of Oregon, Inc. v. Independent Agents of America, Inc., 508 U.S. 439, 449 (1993); United Savings Assn. Of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988); James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1093 (D.C. Cir. 1996), *rehearing en banc denied, cert. denied* 117 S.Ct 737 (1997).

[10] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 205 (1996).

local exchange services to obtain anticompetitive advantage in those new markets the BOCs seek to enter."[11] Admittedly, this approach imposes on BOCs additional obligations not borne by competitive LECs, but that is precisely what Section 272 was intended to do.

B. The Commission Should Revisit Its Interpretation Of Section 222(d)(1)

TRA also joins with those petitioners[12] that have urged the Commission to reconsider its conclusion that "section 222(d)(1) does not require that CPNI be disclosed by carriers when competing carriers have 'won' the customer."[13] While the Commission predicates this view on a belief that "section 222(d)(1) applies only to carriers already possessing the CPNI, within the context of the existing service relationship, and not to carriers seeking access to CPNI,"[14] TRA submits that this is neither the only reasonable, and from a public policy perspective, certainly not the preferred, interpretation of Section 222(d)(1).

Section 222(d)(1) identifies "initiat[ion of] . . . telecommunications service" as one of a number of exceptions to the prohibition on disclosure of CPNI for purposes other than the provision of the service from which the CPNI was derived. The provision does not specify by whom the service will be initiated; service initiation is used only in a very general sense, leaving open the extent of its reach. The statutory reference to "disclosure" of CPNI, however, strongly suggests that

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[11] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at ¶ 6.

[12] *See, e.g.*, MCI Petition at 23 - 28.

[13] Second Report and Order, FCC 98-27 at ¶ 84.

[14] Id.

Congress contemplated that service could be initiated by an entity to which the CPNI would have to be provided -- *i.e.*, an entity other than the entity in possession of the CPNI.

This latter reading would far better address "competitive concerns" than the Commission's narrow interpretation. TRA's resale carrier members need access to the customer records of newly-secured subscribers in order to order and initiate service to these customers in large part because incumbent LECs will not simply provide service on an "as is" basis. Requiring resale competitors to obtain all necessary service information, or to secure authorizations for the release of CPNI, from the subscribers themselves not only creates another administrative hurdle for, but undermines the credibility of, the competitive LEC. Moreover, it does so for no ascertainable benefit. Certainly, customer privacy concerns are not implicated because the subscriber has selected the competitive LEC as its preferred carrier, thereby ensuring that the competitive LEC will have future access to its CPNI. Hence, given the Congressional desire "to balance both competitive and consumer privacy interests with respect to CPNI," the better reading of Section 222(d)(1) would be one that enhances competitive opportunities.

C. The Commission Should Retain, But Fine Tune, Its Rulings Regarding To Use Of CPNI In Conjunction With "Win-Back" And/Or Retention Marketing

TRA urges the Commission to reject challenges[15] to its ruling that 222(d)(1) precludes "a local exchange carrier . . . from using or accessing CPNI derived from the provision of local

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[15] *See, e.g.*, Petition for Reconsideration of BellSouth Corporation ("BellSouth") at 16 - 18; Petition for Partial Reconsideration of the Bell Atlantic Telephone Companies ("Bell Atlantic") at 16 - 18; Petition for Forbearance, Reconsideration, and/or Clarification of GTE Service Corporation ("GTE") at 32 - 38; and Petition for Reconsideration and/or Clarification of AT&T Corp. ("AT&T") at 2 - 5.

exchange service . . . to regain the business of a customer that has chosen another provider,"[16] but to fine tune this ruling to better address likely abuses. TRA agrees with the Commission that use by an incumbent LEC of CPNI for purposes of retaining a customer which has selected a resale carrier alternative, but whose change order has not yet been processed, or reclaiming a customer which has completed its move to a resale carrier alternative, does not constitute use of CPNI in the provision of telecommunication service as required by Section 222(c)(1). Nor do any of the specific exceptions listed in Section 222(d) apply to such conduct. In short, use by incumbent LECs of CPNI to retain or "win-back" customers is in blatant violation of Section 222(c)(1).[17]

Unfortunately, TRA's resale carrier members are all too familiar with a practice engaged in by certain underlying carriers pursuant to which service order information submitted by a resale provider to the underlying carrier's operational side quickly finds its way into the hands of the carrier's sales and marketing personnel. The underlying carrier's sales and marketing personnel then use this "advance notice" of customer loss -- which the underlying carrier received solely by virtue of its provision of telecommunications services to the resale provider -- to attempt to reclaim the customer. While such tactics have ceased to be a major problem in the interexchange industry, they are reappearing at the local level where incumbent LECs generally serve as the only available underlying carriers. Of course, such abuses by incumbent LECs will become all the more serious as more and more incumbent LECs began providing interexchange service within their respective

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[16] Second Report and Order, FCC 98-27 at ¶ 85.

[17] Suggestions by a number of incumbent LECs that the limitations imposed by the Commission on carrier use of CPNI for customer retention\"win-back" purposes violates the "Takings Clause" of the Fifth Amendment to the U.S. Constitution misconstrue the nature of CPNI. CPNI is not the property of the carrier; CPNI belongs to the customer and as such is subject to customer control.

local service areas. This is because the incumbent LEC processes changes not only the customer's choice of local carrier, but the customer's choice of interexchange carrier as well.

Given the importance of this issue to its resale carrier members, TRA agrees with MCI that the Commission's limitation on use of CPNI for retention\"win-back" purposes should be expanded to include the identity of the chosen carrier.[18] As MCI correctly points out, incumbent LEC operational personnel should not be permitted to disclose to sales and marketing personnel a customer's election to change carriers. Obviously, the operational personnel would not be privy to this information but for the resale carrier's use of the incumbent LEC's network services.

With respect to a related matter raised by MCI, TRA also encourages the Commission to declare unlawful what MCI characterizes as "CPNI laundering" - a practice pursuant to which an underlying carrier transmits to, and then reobtains from, a third party CPNI relating to the customers of resale carriers using its network services resale in order to free itself of restraints on the use of that information. Once again, TRA's resale carrier members are all to familiar with this practice as used by certain facilities-based interexchange carriers. In the interexchange industry, CPNI was "laundered" through LECs and although, like retention\"win-back" abuses, the practice has diminished in frequency and impact in the long distance market, it will likely reappear at the local level as resale carriers make increasing competitive inroads. Accordingly, TRA urges the Commission to declare that even "laundered" CPNI should be afforded full protection if it was first received by an incumbent LEC as CPNI entitled to such protection.

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[18] MCI Petition at 51 - 52.

D. Conclusion

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to reconsider and clarify its *Second Report and Order* in a manner consistent with these comments.

Respectfully submitted,

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